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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JOHN MARTINEZ,

Plaintiff,

v.

**CAROLYN W. COLVIN,¹
Acting Commissioner of Social
Security,**

Defendant.

NO. SACV 12-00809-MAN

MEMORANDUM OPINION

AND ORDER

Plaintiff filed a Complaint on May 24, 2012, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's applications for a period of disability ("POD"), disability insurance benefits ("DIB"), and supplemental security income (SSI"). On July 17, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on March 12, 2013, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, alternatively, remanding for further administrative proceedings; and the Commissioner requests that her decision be affirmed or, alternatively, remanded for further administrative

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

proceedings.

SUMMARY OF ADMINISTRATIVE PROCEEDINGS

On March 9, 2009, plaintiff filed applications for a POD, DIB, and SSI, alleging an inability to work since January 1, 2007 (Administrative Record ("A.R.") 22), due to: "[s]tabwound; diabetes II[:]; hypertension[:]; suspect glaucoma; M[RS]A on eyes; renal cyst; [one] kidney significantly large[r] []than the other; hepatitis C; brachycardia; enlarged spleen; anxiety; depression; bipolar [disorder]; [and a] skin disorder" (A.R. 193). At the reconsideration level, plaintiff additionally alleged that he suffers from "[g]astritis, hiatal hernia, pain in shoulders, feet, legs, and back. Eyes hurt and I am seeing things that are not real," which commenced on August 6, 2009. (A.R. 209.)

The Commissioner denied plaintiff's claim initially, and upon reconsideration. (A.R. 68-76, 83-95.) On December 1, 2010, plaintiff, who was represented by counsel, appeared and testified at a hearing before Administrative Law Judge Joseph Lisiecki (the "ALJ"). (A.R. 41-59.) Arnold Ostra, a medical expert, and Susan Allison, a vocational expert, also testified. (*Id.*) On January 19, 2011, the ALJ denied plaintiff's claim (A.R. 22-30), and the Appeals Council subsequently denied plaintiff's request for review of the ALJ's decision (A.R. 1-7). That decision is now at issue in this action.

SUMMARY OF ADMINISTRATIVE DECISION

The ALJ found that plaintiff last met the insured status requirements of the Social Security Act on December 31, 2008, and that he has not engaged in substantial gainful activity since the alleged onset date of January 1, 2007. (A.R. 24.) The ALJ determined that plaintiff has the severe impairments of: "diabetes mellitus (insulin dependent); hepatitis C; a mood disorder and psychosis"; nonetheless, the ALJ concluded that plaintiff does not have an impairment or

1 combination of impairments that meets or medically equals one of the listed impairments in 20
2 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,
3 416.920(d), 416.925, 416.926). (A.R. 24-25.)

4
5 After reviewing the record, the ALJ determined that plaintiff has the residual functional
6 capacity ("RFC") to perform "medium work as defined in 20 C.F.R. [§§] 404.1567(c) and
7 416.967(c) except that he may only occasionally bend, stoop, crawl and climb stairs." (A.R. 26.)
8 Further, "[h]e may never climb ladders, ropes or scaffolds and he must avoid exposure to
9 unprotected heights. He is also limited to simple tasks and may have only occasional contact with
10 the public, co-workers and supervisors." (*Id.*)

11
12 The ALJ found that plaintiff was unable to perform his past relevant work ("PRW") as a
13 "texture painter," "painter helper," "security guard," and "deliverer." (A.R. 28.) Additionally, after
14 having considered plaintiff's age,² education,³ work experience, and RFC, the ALJ found that other
15 jobs exist in the national economy that plaintiff could perform, including "sales attendant" and
16 "assembler of plastic hospital products." (A.R. 29.) Accordingly, the ALJ concluded that plaintiff
17 has not been under a disability, as defined in the Social Security Act, since January 1, 2007, the
18 alleged onset date. (A.R. 30.)

19 20 STANDARD OF REVIEW

21
22 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
23 whether it is free from legal error and supported by substantial evidence. Orn v. Astrue, 495 F.3d
24 625, 630 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a reasonable mind
25

26 ² On the alleged disability onset date, plaintiff was 35 years old, which is defined as
27 a younger individual. (A.R. 29; citing 20 C.F.R. §§ 404.1563, 416.963.)

28 ³ The ALJ found that "[plaintiff] has a limited education and is able to communicate
in English." (A.R. 29.)

1 might accept as adequate to support a conclusion.'" *Id.* (citation omitted). The "evidence must
2 be more than a mere scintilla but not necessarily a preponderance." Connett v. Barnhart, 340
3 F.3d 871, 873 (9th Cir. 2003). "While inferences from the record can constitute substantial
4 evidence, only those 'reasonably drawn from the record' will suffice." Widmark v. Barnhart, 454
5 F.3d 1063, 1066 (9th Cir. 2006)(citation omitted).

6
7 Although this Court cannot substitute its discretion for that of the Commissioner, the Court
8 nonetheless must review the record as a whole, "weighing both the evidence that supports and
9 the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of Health
10 and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also* Jones v. Heckler, 760 F.2d 993, 995
11 (9th Cir. 1985). "The ALJ is responsible for determining credibility, resolving conflicts in medical
12 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
13 1995).

14
15 The Court will uphold the Commissioner's decision when the evidence is susceptible to
16 more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).
17 However, the Court may review only the reasons stated by the ALJ in his decision "and may not
18 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d at 630; *see also* Connett,
19 340 F.3d at 874. The Court will not reverse the Commissioner's decision if it is based on harmless
20 error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential
21 to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th
22 Cir. 2006)(quoting Stout v. Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); *see also* Burch, 400
23 F.3d at 679.

24 25 DISCUSSION

26
27 Plaintiff alleges the following issues: whether the new evidence submitted to the Appeals
28 Council materially undermines the ALJ's decision; and whether the ALJ properly considered

1 plaintiff's subjective complaints. (Joint Stipulation ("Joint Stip.") at 4.)

2
3 **I. The Evidence Newly Submitted To the Appeals Council Does Not**
4 **Undermine The ALJ's Decision.**

5
6 Following the ALJ's adverse ruling, plaintiff submitted to the Appeals Council additional
7 medical records from: (1) St. Jude Medical Center, dated August 20, 2008, through March 1,
8 2011; (2) Anaheim Memorial Care Medical Center, dated June 4, 2009, through August 2, 2010;
9 (3) UC Irvine Medical Center, dated December 3, 2009, through March 28, 2011; and (4) Coastal
10 Dermatology, dated October 29, 2008, through March 30, 2011. (A.R. 5.)

11
12 The Appeals Council considered the new evidence but determined that it did not provide
13 a "basis for changing the [ALJ]'s decision," and thus, plaintiff's request for review was denied.
14 (A.R. 1-2.) Because the Appeals Council considered the newly submitted evidence in deciding
15 whether to review the ALJ's decision, this Court also must consider such evidence in determining
16 whether the ALJ's decision was supported by substantial evidence and free from legal error. *See*
17 Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1163 (9th Cir. 2012)(holding that "when
18 the Appeals Council considers new evidence in deciding whether to review a decision of the ALJ,
19 that evidence becomes part of the administrative record, which the district court must consider
20 when reviewing the Commissioner's final decision for substantial evidence"); Warner v. Astrue,
21 859 F.Supp.2d 1107, 1114–15 (C.D. Cal. 2012)(noting that although the Appeals Councils is not
22 required to provide reasons for discounting additional evidence, the Court reviews "the ALJ's
23 decision in light of the record as a whole, including the evidence submitted for the first time to
24 the Appeals Council")(citing Taylor v. Comm'r of Soc. Sec. Admin., 659 F.3d 1228, 1231–32 (9th
25 Cir. 2011)). The Court may remand upon finding that "there is a substantial likelihood the ALJ's
26 consideration of the additional evidence submitted to the Appeals Council will materially alter the
27 ALJ's disability analysis." *Id.* at 1117.

1 Plaintiff argues that the evidence newly submitted to the Appeals Council "demands an
2 inference of a greater degree of impairment than found by the ALJ," because it demonstrates that
3 his anxiety has been worsening, he suffers from hallucinations, he "may" have schizophrenia, his
4 liver enzymes were very high, his platelet count was low secondary to hepatitis, and he has
5 shoulder pain. (Joint Stip. at 5.)

6
7 This Court has reviewed the ALJ's decision in view of the record as a whole, including the
8 evidence submitted for the first time to the Appeals Council. For the reasons discussed below,
9 the Court concludes that the newly submitted evidence submitted does not undermine the ALJ's
10 decision.

11
12 A. Mental Limitations

13
14 Plaintiff contends that the evidence submitted to the Appeals Council demonstrates that
15 he suffers from severe anxiety, hallucinations, and "possible schizophrenia," which "erode[] the
16 ability to engage in the requirements of work activity." (Joint Stip. at 5-6.) However, this
17 evidence was cumulative of evidence supporting plaintiff's allegations of anxiety and
18 hallucinations, which was already included in the record reviewed by the ALJ. (*See e.g.*, A.R. 409,
19 444, 451-52, 456, 458-59, 462-63, 465-66, 497, 501, 503.)

20
21 Indeed, the ALJ accorded "great weight" to the opinion of consultative psychiatrist Dr.
22 Ernest A. Bagner III, who considered, *inter alia*, plaintiff's complaints of anxiety and auditory and
23 visual hallucinations in determining plaintiff's mental limitations.⁴ (A.R. 409.) However, giving
24 plaintiff "every benefit of the doubt," the ALJ assigned plaintiff a more limited mental RFC than
25

26 ⁴ Dr. Bagner opined that plaintiff would have no limitations interacting with
27 supervisors, peers, or the public; zero to mild limitations maintaining concentration and attention
28 and completing simple tasks; mild limitations completing complex tasks; and mild to moderate
limitations handling normal stresses at work and completing a normal workweek without
interruption. (A.R. 412.)

1 that found by Dr. Bagner. The ALJ, therefore, adopted the mental RFC assessed by the State
2 Agency physician, who also considered and relied on treatment notes indicating plaintiff's
3 complaints of anxiety and hallucinations, in finding that plaintiff was "capable of performing
4 simple, repetitive tasks on a sustained basis." (A.R. 28, 436-37, 493-94.) As there was already
5 evidence in the record of plaintiff's complaints of anxiety and hallucinations, which the ALJ
6 properly considered in his decision, the additional evidence presented to the Appeals Council
7 neither undermined nor warranted reconsideration of the ALJ's decision.⁵

8
9 Plaintiff also alleges that this "new" evidence demonstrates that his "anxiety has been
10 worsening," citing a November 8, 2010 treatment note from his treating physician Dr. E. Scott.
11 (Joint Stip. at 5.) However, when read in its entirety, the note indicated that plaintiff's anxiety
12 was "worsening -- in context of [an] upcoming meeting and [Dr. Scott's] departure," *i.e.*, due to
13 the two upcoming events, one of which was the specter of dealing with a new treating physician.
14 (A.R. 612.) Significantly, treatment notes after November 8, 2010, indicate that plaintiff
15 continued to report anxiety, but there was no indication of any worsening of his anxiety or any
16 other aggravation of his mental health issues. (A.R. 607-11.)

17
18 Finally, plaintiff asserts that the newly submitted evidence demonstrates that he "may"
19 have schizophrenia. Again, however, when read in context, Dr. Scott did not conclusively
20 diagnose plaintiff with schizophrenia, and plaintiff concedes as much. Rather, Dr. Scott appears
21 to be speculating as to whether plaintiff's appropriate diagnosis is bipolar disorder, psychotic
22 depression, or, possibly, schizophrenia.⁶ (A.R. 614.) As Dr. Scott did not offer a definitive
23 diagnosis of schizophrenia, neither the Appeals Council nor the ALJ was required to specifically
24

25 ⁵ Moreover, and significantly, in a treatment note dated September 20, 2010, plaintiff
26 reported that while he had continuing symptoms of hallucinations, they did "not interfer[e] [with]
27 his life." (A.R. 613.)

28 ⁶ As noted by the ALJ, plaintiff's "therapist noted that . . . [plaintiff]'s mental disorders
might be related to . . . [his] substance abuse disorder." (A.R. 27; citing A.R. 382.)

1 address this issue. See Howard v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)(noting that “in
2 interpreting the evidence . . . the ALJ does not need to ‘discuss every piece of evidence’”).

3
4 In sum, the evidence regarding plaintiff’s allegations of anxiety and hallucinations that was
5 presented to the Appeals Council is at best cumulative and does not change the outcome of this
6 case. New evidence is only considered material if it bears directly and substantially on the
7 decision in this case. See Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985).

8
9 B. Physical Limitations

10
11 Plaintiff next contends that the evidence presented to the Appeals Council demonstrated
12 that his liver enzymes were very high and his platelet count was low, secondary to hepatitis C
13 (Joint Stip. at 5.) However, plaintiff does not indicate how these test results would undermine
14 the ALJ’s decision or would prevent plaintiff from performing work activity. There was also no
15 indication in the treatment notes of any worsening of symptoms due to plaintiff’s hepatitis C.
16 Rather, plaintiff’s most recent treatment notes indicate that plaintiff was treating his hepatitis with
17 medication and that his hepatitis was stable. (A.R. 621 (01/14/10 - hepatitis C “stable”); A.R. 620
18 (02/17/10 - “[patient] needs GI eval[uation] for cont[inued treatment with] Pegasys”; A.R. 618
19 (03/10/10 - continue Pegasys). Without any competent medical evidence of how a low platelet
20 count and/or elevated liver enzyme levels supports a finding of disability, this additional evidence
21 does not undermine the substantial evidence in support of the ALJ’s RFC determination.

22
23 Finally, plaintiff argues that the newly submitted evidence establishes that he has a
24 “shoulder impairment [which] will cause significant reaching and handling limitations that erode
25 the medium exertion occupational base.” (Joint Stip. at 5-6.) However, aside from plaintiff’s own
26 complaints regarding pain in his shoulders, which he stated commenced around August 6, 2009
27 (A.R. 53, 209), there is only a single reference of record that plaintiff reported shoulder pain to
28 a physician. (A.R. 613.)

1 In a September 20, 2010 treatment note, which was not before the ALJ but was presented
2 to the Appeals Council, plaintiff presented with "shoulder discomfort[,] unable to lift above head
3 – has had these [symptoms] since 18 [years old] – have been slowly progressive." (A.R. 613.)
4 Dr. Scott noted plaintiff had a decreased range of motion in his left shoulder, and he was unable
5 to fully extend and flexion to 90 degrees. (*Id.*) Dr. Scott then diagnosed "[r]otator cuff strain"
6 and noted that plaintiff may "need surgical intervention, however will try [physical therapy] first."
7 (*Id.*)

8
9 Significantly, although plaintiff stated that his shoulder pain commenced in August 2009,
10 plaintiff did not report his shoulder pain to any physician until more than a year later. (A.R. 209,
11 613.) Moreover, this single treatment note fails to demonstrate any impairment which would
12 prevent plaintiff from performing work activity for a period of at least twelve months, particularly
13 as Dr. Scott only recommended physical therapy and did not assess any functional limitations
14 associated with plaintiff's rotator cuff strain. Thus, the Court finds that this single, isolated
15 complaint does not undermine the substantial evidence in support of the ALJ's RFC determination.
16 See Robbins, 466 F.3d at 882 ("[A] court must consider the entire record as a whole and may not
17 affirm simply by isolating a 'specific quantum of supporting evidence.'") (quoting Hammock v.
18 Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Carmickle v. Comm'r, Soc. Sec. Admin., 533
19 F.3d 1155, 1165 (9th Cir. 2008) (providing that the ALJ did not err in failing to address a
20 physician's recommendation that a plaintiff use a reclining desk chair while working, because it
21 was not stated as an imperative).

22
23 Therefore, in view of the evidence before the ALJ and the additional evidence submitted
24 only to the Appeals Council, this Court finds that the ALJ's decision is supported by substantial
25 evidence.

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27 ///

28 ///

1 **II. The ALJ Provided The Requisite Clear And Convincing Reasons For**
2 **Rejecting Plaintiff's Subjective Pain Testimony.**

3
4 Once a disability claimant produces objective medical evidence of an underlying impairment
5 that is reasonably likely to be the source of claimant's subjective symptom(s), all subjective
6 testimony as to the severity of the claimant's symptoms must be considered. Moisa v. Barnhart,
7 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); *see also*
8 20 C.F.R. §§ 404.1529(a), 416.929(a) (explaining how pain and other symptoms are evaluated).
9 "[U]nless an ALJ makes a finding of malingering based on affirmative evidence thereof, he or she
10 may only find an applicant not credible by making specific findings as to credibility and stating
11 clear and convincing reasons for each." Robbins, 466 F.3d at 883. The factors to be considered
12 in weighing a claimant's credibility include: (1) the claimant's reputation for truthfulness; (2)
13 inconsistencies either in the claimant's testimony or between the claimant's testimony and her
14 conduct; (3) the claimant's daily activities; (4) the claimant's work record; and (5) testimony from
15 physicians and third parties concerning the nature, severity, and effect of the symptoms of which
16 the claimant complains. *See* Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); *see also*
17 20 C.F.R. §§ 404.1529(c), 416.929(c).

18
19 Here, the ALJ concluded that "[a]fter careful consideration of the evidence, . . . [plaintiff]'s
20 medically determinable impairments could reasonably be expected to cause the alleged
21 symptoms." (A.R. 26.) Significantly, the ALJ cited no evidence of malingering by plaintiff.
22 Nonetheless, the ALJ determined that plaintiff's "statements concerning the intensity, persistence
23 and limiting effects of [his] symptoms are not credible to the extent they are inconsistent with the
24 above [RFC] assessment." (A.R. 26-27.) Accordingly, the ALJ's reasons for finding that plaintiff
25 was not credible with respect to his subjective symptom and pain testimony must be "clear and
26 convincing."

27
28 The ALJ rejected plaintiff's subjective complaints because: (1) plaintiff's statements

1 regarding his household chores and daily activities were inconsistent; (2) plaintiff's treatment was
2 inconsistent with his allegation that he was totally disabled; (3) plaintiff's condition improved; and
3 (4) plaintiff engaged in activities of daily living which were inconsistent with his allegation that
4 he was totally disabled. (A.R. 27.) As discussed below, the ALJ provided sufficient clear and
5 convincing reasons for rejecting plaintiff's pain and symptom testimony.

6
7 The ALJ found plaintiff to be not credible, because he made inconsistent statements
8 regarding his ability to engage in household chores and activities of daily living. (A.R. 28.) For
9 example, the ALJ noted that plaintiff reported in his April 13, 2009 "Function Report -- Adult" form
10 that he is able to do household chores, including cleaning, laundry, household repairs, ironing,
11 and mowing if he "feel[s] up to it." (A.R. 183.) However, less than three months later, plaintiff
12 reported to Dr. Bagner that he "does not do [any] household chores or daily activities." (A.R.
13 410.) Clearly these two statements are inconsistent, and thus, the ALJ proffered a clear and
14 convincing reason for finding plaintiff to be not credible.

15
16 The ALJ further discredited plaintiff because he sought limited treatment for many of his
17 conditions, including his diabetes and hepatitis C, which "indicat[es] his symptoms are less . . .
18 severe than [he] alleges." (A.R. 28.) For example, notwithstanding plaintiff's claim that he
19 became disabled in January 2007, the ALJ noted that an April 2008 medical report indicated that
20 plaintiff "did not have a regular primary care physician and did not frequently seek medical care."
21 (*Id.*; citing A.R. 360.) Specifically, with respect to plaintiff's treatment for diabetes, the ALJ cited
22 a July 2009 consultative examination, which noted that plaintiff had "only been admitted to the
23 hospital on two occasions for his diabetes."⁷ (A.R. 27; emphasis added.) With respect to
24 plaintiff's treatment for hepatitis C, the ALJ again cited the April 2008 medical report, which noted

25
26 ⁷ In addition, the ALJ noted that the July 2009 examination also indicated that
27 plaintiff's: "[m]otor, sensory, and reflexes were all intact"; "gait and balance were within normal
28 limits"; and "Phalen's and Tinel's tests were negative." (A.R. 27.) Further, the consultative
examiner, like the ALJ, found "[plaintiff] would be capable of a limited range of medium work."
(*Id.*)

1 that plaintiff “never followed up with his doctor regarding his hepatitis C since after being
 2 diagnosed in 199[6].”⁸ (*Id.*; citing A.R. 360.) The ALJ properly reasoned that “if [plaintiff]’s
 3 conditions were as debilitating as alleged, [plaintiff] would take all steps possible to alleviate his
 4 conditions, including seeking regular treatment.” (A.R. 28.) Accordingly, plaintiff’s failure to seek
 5 regular treatment for his allegedly disabling impairments constituted a clear and convincing
 6 reason for rejecting his credibility.⁹ *See Flaten v. Sec’y of Health & Hum. Servs.*, 44 F.3d 1453,
 7 1464 (9th Cir. 1995)(finding it appropriate for the ALJ to discount plaintiff’s credibility because of
 8 a lack of medical care during a period of claimed disability).

9
 10 Additionally, the ALJ noted improvement with respect to plaintiff’s mental impairments.
 11 (A.R. 27.) For example, the ALJ noted that “on April 10, 2009, . . . Dr. Scott [found plaintiff’s
 12 condition] was improving . . . and also that he was feeling less overwhelmed.” (*Id.*; citations
 13 omitted.) The ALJ further noted that “[a]t a July 31, 2009 office visit with Dr. Scott, [plaintiff]’s
 14 mood was better off[,] . . . [and plaintiff] denied suicidal ideation at a September 2009 office
 15 visit.” (*Id.*; internal citations omitted.) Further, the ALJ noted that in a July 2009 consultative
 16 examination with Dr. Bagner, plaintiff: “had good hygiene”; “was well nourished and had a
 17 normal posture and gait”; had intact and coherent speech and “tight” thought processes; “showed
 18 no flight of thought, looseness of association, thought blocking or distactibility”; “had normal
 19 reality contact”; and had “no . . . auditory or visual hallucinations during the interview.” (*Id.*)
 20 Accordingly, the above-noted improvement in plaintiff’s condition constituted a clear and
 21

22 ⁸ The ALJ states that plaintiff was diagnosed with hepatitis C in 1998; however, the
 23 treatment note, upon which the ALJ cites in support of his statement, indicates that plaintiff was
 diagnosed with hepatitis C in 1996. (*Id.*)

24 ⁹ Plaintiff appears to claim that the ALJ’s rejection of plaintiff’s credibility based on his
 25 limited treatment for hepatitis C was improper, because “[plaintiff] had to stop taking medication
 26 for his hepatitis C because he was no longer insured and unable to secure payment for the
 27 medication.” (Joint Stip. at 13.) While it is true that the record reflects that plaintiff did not have
 28 insurance for a limited period of time (*compare* A.R. 405 (7/6/09 - “[plaintiff] has not been taking
 [his hepatitis C] medication for two days because he ran out of insurance”), *with* A.R. 447
 (8/28/09 - noting plaintiff’s hepatitis C treatment had been “restarted”), plaintiff provides
 absolutely no explanation for his failure to seek treatment when he still had insurance. As such,
 plaintiff’s claim is unavailing.

1 convincing reason not to credit fully his subjective symptom testimony.¹⁰ See Morgan v. Comm'r
2 of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999)(ALJ may discount claimant's credibility
3 based on medical improvement).

4
5 Lastly, the ALJ discredited plaintiff, because he "engaged in activities of daily living which
6 were inconsistent with [his] allegation that he was totally disabled." (A.R. 27-28.) The ALJ noted
7 that "[plaintiff] was independent in self care, prepared his own meals daily, performed household
8 chores such as cleaning, doing the laundry, reading, making models, painting and doing wood
9 work." (*Id.*) The ALJ also noted that "[plaintiff] enjoyed watching the Discovery and History
10 channel[s]." (A.R. 28.) As an initial matter, the ALJ's description of plaintiff's daily activities is
11 incomplete and misleading. For example, the ALJ failed to include plaintiff's statement that he
12 does household chores only "if [he] feel[s] up to it" (A.R. 183) and his statement that he does
13 not watch cable television or do any hobbies, except reading, because he cannot afford them
14 (A.R. 184). Moreover, and significantly, beyond failing to accurately describe plaintiff's daily
15 activities, the ALJ failed to specifically articulate *how* plaintiff's daily activities are inconsistent with
16 his allegedly disabling symptoms. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998)(only
17 if the level of activity was inconsistent with claimant's claimed limitations would the activity have
18 any bearing on claimant's credibility). Thus, without more, the ALJ's boilerplate statement cannot
19 constitute a clear and convincing reasoning for finding plaintiff to be not credible.

20
21 The Court finds, however, that the ALJ's error in relying on plaintiff's daily activities to
22 undermine his credibility was harmless, because the ALJ's other reasons and ultimate credibility
23 determination are supported by substantial evidence. See Carmickle, 533 F.3d at 1162–63
24 (holding that ALJ's reliance on two invalid reasons in support of adverse credibility determination
25 was harmless where remaining reasons were adequately supported by substantial evidence). The

26
27 ¹⁰ Plaintiff asserts that the evidence submitted to the Appeals Council "paints a portrait
28 of a man who continues to deteriorate mentally." (Joint Stip. at 13.) However, plaintiff's
assertion that his condition deteriorated is unpersuasive for the reasons discussed *supra*.

1 Court therefore finds and concludes that reversal is not warranted based on the ALJ's alleged
2 failure to properly consider plaintiff's testimony.

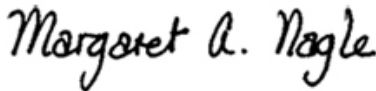
3
4 **CONCLUSION**

5
6 For the foregoing reasons, the Court finds that the Commissioner's decision is supported
7 by substantial evidence and is free from material legal error. Neither reversal of the
8 Commissioner's decision nor remand is warranted.

9
10 Accordingly, IT IS ORDERED that Judgment shall be entered affirming the decision of the
11 Commissioner of the Social Security Administration. IT IS FURTHER ORDERED that the Clerk of
12 the Court shall serve copies of this Memorandum Opinion and Order and the Judgment on counsel
13 for plaintiff and for the Commissioner.

14
15 LET JUDGMENT BE ENTERED ACCORDINGLY.

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17 DATED: October 30, 2013

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MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE
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